

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

INVICTUS GLOBAL SERVICES,
INC.,

Plaintiff,

v.

INSITU, INC.,

Defendant.

NO. 1:21-CV-3161-TOR

ORDER DENYING PLAINTIFF'S
MOTION TO REMAND

BEFORE THE COURT is Plaintiff's Motion to Remand (ECF No. 10).

This matter was submitted for consideration with telephonic oral argument on March 2, 2022. Michael B. FitzSimons argued on behalf of Plaintiff. Michael E. Scoville argued on behalf of Defendant. The Court has reviewed the record and files herein, considered the parties' oral arguments and is fully informed. For the reasons discussed below, Plaintiff's Motion to Remand (ECF No. 10) is denied.

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1 BACKGROUND

2 This case concerns a contract dispute where Plaintiff provided deployed
3 unmanned aircraft systems (“UAS”) operator services to Defendant in support of
4 Defendant’s defense contracts with the United States military. *See* ECF No. 1-2.
5 On October 27, 2021, Plaintiff filed suit in the Superior Court of Klickitat County,
6 raising breach of contract and promissory estoppel claims. *See id.* On December
7 10, 2021, Defendant removed the action to this Court pursuant to 28 U.S.C. §
8 1442(a)(1). ECF No. 1. On January 7, 2022, Plaintiff filed the present motion to
9 remand. ECF No. 10. Defendant timely filed a response. ECF No. 12.

10 Defendant is a corporation that provides design, development, production,
11 and operation support of UAS defense to the United States government and other
12 customers. ECF Nos. 1-2 at 1, ¶ 1.2; 10-1 at 2, ¶¶ 5-6. Plaintiff provides technical
13 and integration services to customers in the UAS industry. ECF No. 1-2 at 1, ¶ 1.1.

14 On January 31, 2020, the parties entered into a Memorandum of Agreement
15 (“MoA”) where Plaintiff, as a subcontractor, was to provide deployed unmanned
16 aircraft systems operator services (also called Field Service Reps or “FSR”) to
17 Defendant. ECF No. 1-2 at 2, ¶ 3.1. The MoA was for a period of two years,
18 beginning February 1, 2020 through January 31, 2022, with the option to extend
19 for two additional years. ECF No. 1-2 at 3, ¶ 3.5. Plaintiff was one of three FSR
20 subcontractors that Defendant would award “seat days” for a particular FSR

1 provider. ECF No. 1-2 at 2, ¶ 3.2. Defendant committed to awarding a minimum
2 of 6,000 seat days to Plaintiff for each year of the contract but “actual
3 commitments are contingent upon contracts awarded to Insitu, and Invictus’
4 performance throughout 2020.” ECF No. 1-2 at 3, ¶¶ 3.7-3.8, at 4, ¶ 3.12.

5 Between 2020 and 2021, Plaintiff was awarded two prime contracts with the
6 United States military for the Naval Air Warfare Center Aircraft Division
7 (“NAWCAD”) and the Naval Air Systems Command (“NAVAIR”). ECF No. 1-3
8 at 2, ¶ 4. Both contracts bear the rating of DO-A1 under the Defense Priorities and
9 Allocation System, making the contracts covered by the Defense Production Act.
10 ECF No. 1-3 at 2, ¶ 5.

11 In March 2020, “United States authorities ordered Insitu to rapidly withdraw
12 all Insitu and contractor personnel and cease operations indefinitely at one overseas
13 site due to concerns about COVID-19.” ECF No. 1-3 at 3, ¶ 7. In April 2020,
14 NAVAIR issued a formal stop work order directing Insitu to stop activity related to
15 the task order covering operations at the overseas site in question. *Id.* As a result
16 of the March and April orders, Insitu canceled four full-time FSR seat positions
17 awarded to Plaintiff. *Id.* In 2021, Defendant also received orders relating to the
18 United States military withdrawal from Afghanistan. “The military issued multiple
19 orders to Insitu modifying the scope of work being performed in Afghanistan,
20 eventually stopping work for the sites where Insitu was providing UAS operational

support” which resulted in Insitu withdrawing all FSRs deployed to Afghanistan by the end of July 2021. ECF No. 1-3 at 3, ¶ 8. On October 15, 2021, NAVAIR terminated for convenience the task order it awarded to Insitu under Prime Contract No. N00019-17-D-0095 for UAS operational support in Afghanistan, a contract under which Plaintiff was awarded seat days. ECF No. 1-3 at 3, ¶ 10. The termination was to “stop work as specified,” “place no further subcontracts or orders for materials, services, or facilities, except as necessary to complete the continued portion of the contract,” and “terminate all subcontracts to the extent they relate to the work terminated.” *Id.*

Defendant did not fulfill the minimum 6,000 seat days committed to Plaintiff for either year in the MoA. ECF No. 1-2 at 6, ¶¶ 4.2-4.3.

DISCUSSION

I. Federal Removal Statute

The federal officer removal statute authorizes removal of a civil action brought against any person acting under an officer of the United States “for or relating to any act under color of such office.” 28 U.S.C § 1442(a)(1). “The ‘basic purpose’ of the statute is ‘to protect the Federal Government from the interference with its operations that would ensue were a State able, for example, to arrest and bring to trial in a State court for an alleged offense against the law of the State, officers and agents of the Government acting within the scope of their authority.’”

1 *Saldana v. Glenhaven Healthcare LLC*, --- F.4d ---, 2022 WL 518989, at *2 (9th
2 Cir. Feb. 22, 2022) (quoting *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 150
3 (2007)). While it is to be liberally construed, the statute is nonetheless limited by
4 its “language, context, history, and purposes.” *Id.*

5 The party seeking removal under the statute bears the burden of showing by
6 a preponderance of the evidence that: (1) it is a person within the meaning of the
7 statute; (2) there is a causal nexus between its actions taken pursuant to a federal
8 officer’s directions and the plaintiff’s claims; and (3) it can assert a colorable
9 federal defense. *Riggs v. Airbus Helicopters, Inc.*, 939 F.3d 981, 986-87 (9th Cir.
10 2019). Here, the parties do not dispute Defendant is a “person” within the meaning
11 of the statute. ECF No. 10 at 4; *see also Fidelitad, Inc. v. Insitu*, 904 F.3d 1095,
12 1099 (9th Cir. 2018) (“Insitu is plainly a ‘person’ within the meaning of §
13 1442(a)(1).”).

14 A. *Causation*

15 To demonstrate a causal nexus, the defendant must show (1) it took actions
16 under a federal officer or took action “pursuant to a federal officer’s directions”
17 and (2) the actions are causally connected to the dispute. *Goncalves By & Through
Goncalves v. Rady Children’s Hosp. San Diego*, 865 F.3d 1237, 1244 (9th Cir.
18 2017) (recognizing this prong presents a low hurdle). “Actions under” a federal
19 officer includes private persons who assist or carry out the duties or tasks of a

1 federal officer. *Watson*, 551 U.S. at 151. The relationship typically involves
2 “subjection, guidance, or control” but does not include mere compliance with
3 federal law, even where the regulation is highly detailed, supervised, and
4 monitored. *Id.* at 152. When assessing whether a causal nexus exists, courts credit
5 the defendant’s theory of the case. *Leite v. Crane Co.*, 749 F.3d 1117, 1124 (9th
6 Cir. 2014).

7 Defendant asserts that as a federal contractor, it took actions in response to
8 military orders both related to the COVID-19 pandemic and the withdrawal from
9 Afghanistan that “changed or eliminated [Plaintiff’s] work.” ECF No. 12 at 13. In
10 March 2020, “United States authorities ordered Insitu to rapidly withdraw all Insitu
11 and contractor personnel and cease operations indefinitely at one overseas site due
12 to concerns about COVID-19.” ECF No. 1-3 at 3, ¶ 7. In April 2020, NAVAIR
13 issued a formal stop work order directing Insitu to stop activity related to the task
14 order covering operations at the overseas site in question. *Id.* As a result of the
15 March and April orders, Insitu canceled four full-time FSR seat positions awarded
16 to Plaintiff. *Id.* In 2021, Defendant also received orders relating to the United
17 States military withdrawal from Afghanistan. “The military issued multiple orders
18 to Insitu modifying the scope of work being performed in Afghanistan, eventually
19 stopping work for the sites where Insitu was providing UAS operational support”
20 which resulted in Insitu withdrawing all FSRs deployed to Afghanistan by the end

1 of July 2021. ECF No. 1-3 at 3, ¶ 8. On October 15, 2021, NAVAIR terminated
2 for convenience the task order it awarded to Insitu under Prime Contract No.
3 N00019-17-D-0095 for UAS operational support in Afghanistan. ECF No. 1-3 at
4 3, ¶ 10.

5 It is undisputed that Defendant was directed by federal officers to modify
6 and stop work at various sites due to the pandemic and withdrawal from
7 Afghanistan. Defendant's termination of the seat days awarded to Plaintiff were a
8 direct result of these orders. While Plaintiff contends that the canceled contracts
9 did not account for the failure to award all 6,000 seat days for each year and the
10 contract was not limited to U.S. government customers, Defendant has
11 demonstrated that these orders made it impossible to satisfy the 6,000 seat day
12 commitment – Defendant would not have been able to award sufficient seat days
13 without government military contracts, the primary customer for the parties'
14 services. ECF Nos. 1-3 at 3, ¶ 8; 12-1 at 3, ¶ 5. In any event, the Court credits as
15 true Defendant's theory of the case when assessing the causal nexus. *Leite*, 749
16 F.3d at 1124. The Court finds a sufficient causal nexus exists between Defendant's
17 action taken pursuant to a federal officer's direction and Plaintiff's claims. See
18 *Fidelitad*, 904 F.3d at 1099-100 (citing case for support that held "a private
19 contractor was acting under a federal officer when it terminated a subcontractor,

1 because the government directed the contract to ‘halt the provision of services that
2 were the object of its subcontract.”).

3 B. *Colorable Defense*

4 Insitu asserts that it has colorable defenses under the Defense Production Act
5 of 1950 (“DPA”), 50. U.S.C. § 4501 *et seq.*, and the doctrine of official
6 justification. *See* ECF Nos. 1 at 15-20; 12 at 20-24.

7 Under the DPA contractor immunity provision, “[n]o person shall be held
8 liable for damages or penalties for any act or failure to act resulting directly or
9 indirectly from compliance with a rule, regulation, or order issued pursuant to this
10 chapter.” 50 U.S.C. § 4557. Similarly, the common law doctrine of official
11 justification can apply as a defense where the challenged actions were taken on the
12 government’s behalf. *See Willingham v. Morgan*, 395 U.S. 402, 409 (1969).

13 Plaintiff asserts claims for Defendant’s failure to meet its 6,000 seat day
14 minimum commitment obligation for each year of the contract. ECF No. 1-2 at 6-
15 7, ¶¶ 4.2-5.9. Defendant’s argument that it was unable to fulfill the contract
16 requirements due to its actions taken pursuant to a federal officer’s orders, credited
17 as true, would trigger an immunity defense. Additionally, seat days awarded to
18 Plaintiff were in contracts covered by the Defense Production Act. ECF No. 1-3 at
19 2, ¶ 5. The Court finds the defenses colorable. *Leite*, 749 F.3d at 1124. In sum,

1 Defendant has shown by a preponderance of the evidence that all elements are
2 satisfied under the federal officer removal statute.

3 **ACCORDINGLY, IT IS HEREBY ORDERED:**

4 Plaintiff's Motion to Remand (ECF No. 10) is **DENIED**.

5 The District Court Executive is directed to enter this Order and furnish
6 copies to counsel.

7 DATED March 2, 2022.



8 A handwritten signature in blue ink that reads "Thomas O. Rice".
9 THOMAS O. RICE
United States District Judge
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